

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**FIRST APPEAL No. 800 of 1992****For Approval and Signature:****HONOURABLE MR.JUSTICE KS JHAVERI**

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DEVKI FABRICS LTD - Appellant(s)**Versus****RAIBEN WD/O MAFATLAL GANGARAM PATEL & 1 - Defendant(s)**

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Appearance :

MR DG CHAUHAN for Appellant(s) : 1,

MR KV GADHIA for Defendant(s) : 1,

MR HJ BHATT for Defendant(s) : 2,

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CORAM : HONOURABLE MR.JUSTICE KS JHAVERI**Date : 17/08/2006****ORAL JUDGMENT**

1. This appeal is directed against the judgement and order dated 13.02.1992 passed by the Civil Judge (SD), and Commissioner for Workmen's Compensation Act, Mehsana in Workmen's Compensation Case No.16 of 1991 whereby the said application has been partly allowed and the claimant has been awarded a total sum of Rs.70,216/-along with interest at the rate of 6%.

2. The case of the applicant is that her deceased husband was working as a fitter porter in the

establishment of opponent no.1 for the last 17 years. On 10.04.89, when the deceased was discharging his duty, due to strain and exertion of work, he sustained heart attack and died on the spot. The deceased at the time of death was 43 years old and earning Rs. 1300/- per month. Under the circumstances the widow of the deceased filed application for compensation wherein the Commissioner has passed the aforesaid award.

3. The present appeal has been filed on the ground that the second respondent has not been held liable for the amount of compensation as well as the amount of penalty and interest.

4. Learned advocate for the appellant submitted that the Commissioner ought to have rejected the claim qua the appellant as the concerned workman was fully insured with the respondent no.2 especially for the purpose of Workmen Compensation Act, 1924. He has further contended that the Commissioner ought to have held that the respondent no.2-insurance company is liable to pay compensation under the policy.

5. On perusal of the record it is found that the deceased was under the employment of the appellant. As

regards the position of respondent no.2 is concerned, it is a settled law that the employer while entering into contract of insurance can act as per his will and can contract out of certain items of his liability such as liability to pay interest. In the case of **New India Assurance Co. Ltd. V. Harshadbhai Amrutbhai Modhiya**, reported in 2006 AIR SCW 2352 in paras 14, 15 and 21 it is held as under:

14. By reason of the provisions of the Act, an employer is not statutorily liable to enter into a contract of insurance. Where, however, a contract of insurance is entered into by and between the employer and the insurer, the insurer shall be liable to indemnify the employer. The insurer, however, unlike under the provisions of the Motor Vehicles Act does not have a statutory liability. Section 17 of the Act does not provide for any restriction in the matter of contracting out by the employer vis-a-vis the insurer.

15. The terms of a contract of insurance would depend upon the volition of the parties. A contract of insurance is governed by the provisions of the Insurance Act. In terms of the provisions of the Insurance Act, an insured is bound to pay premium which is to be calculated in the manner provided for therein. With a view to minimize his liability, an employer can contract out so as to make the insurer not liable as regards indemnifying him in relation to certain matters which do not strictly arise out of the mandatory provisions of any statute. Contracting out, as regards payment of interest by an employer, therefore, is not prohibited in

law.

21. For the reasons aforementioned, the impugned judgement cannot be sustained. It is set aside accordingly. The appeal is allowed. The appellant is not liable for the interest. However, we make it clear that the employer shall be liable to pay the amount of interest to the claimant. In the facts and circumstances of the case, there shall be no order as to costs."

In view of the above decision, the insurance company can be held liable only for the amount of compensation payable to the original claimant but no liability qua interest and penalty on the compensation can be fastened upon the respondent no.2 Insurance Company.

6. In the premises aforesaid, the appeal is, partly allowed. The amount of compensation shall be paid by the insurance company and the amount of interest and penalty shall be paid by the employer. The award of the Tribunal is modified accordingly. No order as to costs.

(K.S. JHAVERI, J.)

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